

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4608

Summary Calendar

RICHARD ROMANO,

Petitioner-Appellant,

versus

U.S. PAROLE COMMISSION

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(5:91 CV 126)

(January 6, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Richard Romano filed this habeas action pursuant to 28 U.S.C. § 2241 to challenge the United States Parole Commission's determination that his conviction for conspiracy to distribute narcotics rates as a category eight severity offense under the parole policy guidelines. See 28 C.F.R. § 2.20 (1987) ("Paroling policy guidelines: Statements of general policy"). The district

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, we have determined that this opinion should not be published.

court denied Romano's petition for habeas relief with prejudice, and Romano appeals from that judgment. Finding no error, we affirm.

I

In August 1986, following a two-year undercover operation conducted by the Drug Enforcement Agency (DEA), Romano, along with thirteen co-defendants, was indicted for his involvement in an extensive drug distribution network. Romano pled guilty to one count of conspiracy to violate federal narcotics laws--a violation of 21 U.S.C. § 846.

Prior to Romano's sentencing for his conspiracy conviction, the government submitted a pre-sentence report ("PSR")--a report partially based upon evidence adduced at the conspiracy trial of Romano's co-defendants¹--which details Romano's involvement in the drug distribution conspiracy. The federal district court for the Southern District of New York denied Romano's request for a hearing to challenge portions of his PSR, and, relying upon information in that report, sentenced Romano to twenty years imprisonment--the maximum term for his offense. The Court of

¹ During this related trial, which was held before the same district judge who presided over Romano's sentencing, it was established that, among other things, Romano: (i) had served as the "eyes and ears" of one of the conspiracy leaders; (ii) became deeply involved in narcotics distribution activities--for example, by conducting heroin transactions and running criminal "errands"; (iii) was involved in the hijacking of ten trucks in 1978; and (iv) was involved in an extortion business, which included Romano's presence during the planning of a scheme targeted at an eighty-year-old businessman in which a propane torch was to be used to secure compliance with extortion demands. See United States v. Romano, 825 F.2d 725, 727 (2d Cir. 1987) (Romano's appeal from his conviction).

Appeals for the Second Circuit affirmed both the district court's refusal to grant Romano a hearing to challenge his PSR and the sentence it imposed upon him. See id. at 728-31. Romano is presently serving his sentence in Texarkana, Texas.

In 1990, Romano filed a petition for habeas relief from his sentence, asserting that the Parole Commission committed reversible error (i) in determining the category of severity of his offense under the parole policy guidelines, (ii) by failing to consider mitigating circumstances regarding his drug dependency, and (iii) by relying upon allegedly erroneous information in his PSR which defines both Romano's role in the narcotics conspiracy and the amounts of heroin and cocaine involved in that conspiracy. The district court dismissed Romano's petition, and he now raises these same issues on appeal.

II

"Congress has given the Parole Commission absolute discretion concerning matters of parole." Maddox v. United States Parole Commission, 821 F.2d 997 (5th Cir. 1987), citing 18 U.S.C. § 4203 (other citations omitted). The reason is that "parole is not a right, but rather only an expectation that may be granted by the Commission." Stroud v. United States Parole Commission, 668 F.2d 843, 847 (5th Cir. 1982), citing Page v. United States Parole Commission, 651 F.2d 1083, 1085 (5th Cir. 1981), cert. denied, 459 U.S. 846, 103 S. Ct. 102 (1982).

"As with sentencing courts, the only constraints on the information that may be considered by the Parole Commission are

constitutional." Maddox, 821 F.2d at 999. Accordingly, this court has held that "the Commissioner may consider dismissed counts of an indictment, hearsay evidence, and allegations of criminal activity for which the prisoner has not even been charged." Id. (footnotes providing citations omitted); see also United States v. Engs, 884 F.2d 894, 895 n.1 (5th Cir. 1989) (holding that it was not error for a PSR to contain a statement regarding the total amount of loss suffered by banking institutions the defendant allegedly victimized even though the defendant was not charged with all of these offenses).

In sum, "[t]his Court cannot disturb a decision by the Commission setting the time for parole release absent a showing that the action is 'flagrant, unwarranted, or unauthorized.'" Young v. United States Parole Commission, 682 F.2d 1105, 1108 (5th Cir.) (citing Page, 651 F.2d at 1085), cert. denied, 459 U.S. 1021, 103 S. Ct. 387 (1982). Accordingly, our standard of review is summarized as follows: "Although the Commission's decisions must have a factual basis, judicial review is limited to whether there is 'some evidence' in the record to support the Commission's decision." Maddox, 821 F.2d at 1000 (emphasis added), citing Kramer v. Jenkins, 803 F.2d 896, 901 (7th Cir. 1986).

III

A

Romano's first contention is that the Parole Commission erred in rating his conspiracy conviction a category eight

offense. Specifically, although Romano does not dispute that the record indicates that he "was involved" with heroin, he contends that there is no factual basis to support the Commission's determination that he was also distributing cocaine.² We disagree.

As stated above, all that is needed to sustain the Parole Commission's determination is "some evidence." See Maddox, 821 F.2d at 1000. Romano was convicted of participating in a conspiracy to distribute controlled substances, and the extent of his involvement in that conspiracy--a conspiracy which lasted from 1978 until at least 1983--is well-supported by the record. Moreover, evidence in the record also establishes that, at the conclusion of the DEA's investigation of the narcotics distribution conspiracy, 2.07 kilograms of 100 percent pure heroin and approximately 7.5 kilograms of 100 percent pure cocaine³ were seized at the residence of another conspirator.⁴

² In December 1989, the Parole Commission Program Coordinator suggested that Romano's offense severity rating was improperly determined to be a category eight, and that it should be a category seven. Romano appealed his offense severity rating and, on appeal, it was determined that a category eight rating is appropriate because the "heroin and cocaine in [Romano's] case each represent in excess of 50% of the amount needed to rate [Romano's] offense as Category Eight." See infra note 3 and accompanying text.

³ These figures represent 69% of the amount of heroin and 50% of the amount of cocaine needed to rate Romano's conspiracy conviction a category eight offense. Together, they equal more than 100% of the category eight requirement. See 28 C.F.R. § 2.20 (1987).

⁴ This evidence is summarized in the Report and Recommendation of the United States Magistrate, which the district court relied upon in dismissing Romano's petition. The

In sum, in light of the evidence in the record establishing Romano's involvement in the drug distribution conspiracy, this court's jurisprudence surrounding the shared responsibility of co-conspirators for their common crime,⁵ and our standard of review regarding Parole Commission determinations,⁶ we find that

Report states:

Romano's first complaint is that no evidence exists to link him to cocaine dealing. However, he pled guilty to Count One of the indictment, which charged all fourteen defendants involved with conspiring to violate federal narcotics laws. One of his co-conspirators, Edward Margiotta, pled guilty to possession with intent to distribute of (sic) one kilogram of cocaine and diluents. Philip Vasta, another co-conspirator, pled guilty to possession with intent to distribute of (sic) nine kilograms of cocaine and diluents. The presentence investigation report reveals that Vasta's apartment was raided and the search yielded 5.4 million dollars in cash, three money-counting machines, six kilograms of heroin, nine kilograms of cocaine, a wide array of drug paraphernalia, and drug ledgers and records.

See generally United States v. Vasta, 649 F. Supp. 974, 978 (S.D.N.Y. 1986) (in addressing motions by various members of this conspiracy, discussing the conspirators' involvement and the underlying DEA investigation); see also Romano, 825 F.2d at 726-27 (Romano's appeal from his conviction and sentence).

⁵ See United States v. Garcia, 917 F.2d 1370, 1377 (5th Cir. 1990) ("A party to a conspiracy may be held responsible for a substantive offense committed by a coconspirator in furtherance of the conspiracy, even if that party does not participate in or have any knowledge of the substantive offense."); United States v. Raborn, 872 F.2d 589, 596 (5th Cir. 1989) ("[T]he jury might find Gentry guilty even though he had not participated in the acts constituting the offense if he were a coconspirator because each conspirator is held to be the agent of the other conspirators."), citing Pinkerton v. United States, 328 U.S. 640, 645-48, 66 S. Ct. 1180, 1183-84 (1946). But see Roberts v. Corrothers, 812 F.2d 1173, 1180 (9th Cir. 1987) (affirming Parole Commission's evaluation of severity regarding defendant's involvement in narcotics conspiracy, but stating that parole inquiries into offense severity should focus on the actual offense behavior of the individual prisoner).

⁶ See supra Part II.

the record contains "some evidence" that Romano was a major participant in a scheme to distribute cocaine as well as heroine. Accordingly, we conclude that the Parole Commission did not err in rating Romano's conspiracy conviction a category eight offense.

B

Romano's second contention is that the Parole Commission did not consider certain mitigating circumstances. Specifically, he alleges that he "was a Second Level participant in the offense and . . . , by his own admission, had at the time, a drug problem" which affected his physical and mental well-being and contributed to his association with the other conspirators.

Romano's contention lacks a factual predicate. First, his PSR, as well as the Parole Commission's pre-hearing assessment and summary of the initial hearing, contradict Romano's assertions that his drug dependency and role in the conspiracy were not considered.⁷ Second, at his initial hearing before the parole panel, Romano was given an opportunity to explain the circumstances surrounding his offenses and his defenses to the information used to determine his offense severity rating-- thereby satisfying the requirements of due process. See Mack v. McCune, 551 F.2d 251, 253 (10th Cir. 1977) ("Due process requires only that a parolee be permitted to present his mitigating

⁷ In the brief he has submitted to this court, Romano even acknowledges this, stating that, "[t]o the point of the drug problem that Appellant had, it is documented in the Pre-Sentence Investigation Report the reasons that Appellant was involved in the offense."

circumstances to the Board"). In short, Romano had no right to be believed by the Commission, and we find no merit in his contention that the mitigating factors he was given an opportunity to present were not considered. See Stroud v. United States Parole Commission, 668 F.2d 843, 846 (5th Cir. 1982) (holding that Commission does not have to give major consideration to petitioner's mitigating circumstances or institutional conduct in reaching its decision to determine petitioner's release date); see also Robinson v. Hadden, 723 F.2d 59, 64 (10th Cir. 1983) ("Even though it is true that certain factors exist which are favorable to Robinson, they are only factors for the Parole Commission to consider, and the Hearing Summary recited the factors, bringing them before the Commission."), cert. denied, 466 U.S. 906, 104 S. Ct. 1684 (1984); Solomon v. Elsea, 676 F.2d 282, 291 (7th Cir. 1982) (despite factors favorable to the petitioner, holding that, "[b]ecause a rational basis exists in the record to support the Commission's conclusions, the decision of the Parole Commission must not be disturbed").

C

Romano's final contention is that the Parole Commission based its decision on erroneous information. Specifically, he objects to the use of information in the PSR regarding the amount of heroin and cocaine involved in the conspiracy, his role in the conspiracy, and his extortion activities.

As stated above,⁸ "[i]n assessing parole status, the Commission may take into account any substantial information available to it in establishing the prisoner's offense severity rating, salient factor score, and any aggravating or mitigating circumstances." Engs, 884 F.2d at 895 n.1 (internal quotation and citation omitted). "[T]he only constraints on the information that may be considered by the Parole Commission are constitutional." Maddox, 821 F.2d at 999.

The Parole Commission's determinations reflect the fact that it considered evidence contained in Romano's PSR, which includes evidence from a related trial showing Romano's involvement in a drug distribution ring that operated for at least five years. See Romano, 825 F.2d at 726 (Romano's appeal from his conviction). It was within the Commission's discretion to review such information,⁹ and "it is not the function of [this court] to review . . . the credibility of the reports and information received by the Board in making its determination." Maddox, 821 F.2d at 999-1000. Accordingly, we find no reversible error.

IV

For the foregoing reasons, we AFFIRM the district court's dismissal of Romano's petition for habeas relief from the Parole Commission's determination.

⁸ See supra Part II.

⁹ Information contained in PSRs and sentencing transcripts may serve as the basis for Parole Commission decisions. See 18 U.S.C. § 4207(3); Maddox, 821 F.2d at 999.